

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IVON GARCIA, et al, and all others similarly      Case No.: 3:10-CV-01817-O  
situated under 29 U.S.C. 216(B),

vs.

THE CUPCAKE FACTORY INC., et al.

Defendants.

\_\_\_\_\_ /

**PLAINTIFFS' MOTION FOR ENTRY OF DEFAULT**  
**BY THE CLERK AS AGAINST THE CUPCAKE FACTORY INC.**

**COME NOW THE PLAINTIFFS, THROUGH COUNSEL, AND STATE:**

1. As indicated by the Proof of Service executed filed as DE# 5, Defendant THE CUPCAKE FACTORY INC. was served with the Summons and Complaint on 9/20/10 but did not answer timely.
2. The Defendant was required, by law, to timely respond to the complaint. Fed. R Civ. P. 12(a)(1)(A).
3. As indicated by the Court's Docket, as of 1/25/11 the Defendant has failed to serve any papers as required by law after receiving service of the Complaint, and has not obtained counsel. Plaintiffs therefore move for entry of a clerk's default pursuant to Fed. R Civ. P. 55.
4. Thus, the Defendant has failed to respond to the initial Complaint regarding the first named Plaintiff IVON GARCIA.

**MEMORANDUM OF LAW:**

Fed. R Civ. P. 4(a) states that the summons must state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The summons(es) filed as DE# 5 demonstrate service and are legally compliant. Defendant THE CUPCAKE FACTORY INC failed to respond pursuant to Fed. R Civ. P. 12(a)(1)(A). A clerk's

default should therefore be entered pursuant to Fed. R Civ. P. 55 as to Defendant THE CUPCAKE FACTORY INC.

WHEREFORE, THE PLAINTIFFS REQUEST THE CLERK TO ENTER A DEFAULT AGAINST THE DEFENDANT THE CUPCAKE FACTORY INC. AS TO PLAINTIFF IVON GARCIA.

**CERTIFICATE OF CONFERRAL**

Plaintiff did not confer with defense counsel as there is not one in this case as of the time of filing this motion.

**Respectfully submitted,**

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ATTORNEYS FOR PLAINTIFFS  
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BY: /S/ K. DAVID KELLY  
K. DAVID KELLY, ESQ.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING WAS SENT SUBSEQUENT TO E-FILING ON 1/25/11 TO:

(VIA U.S. MAIL AS NO COUNSEL OF RECORD IS LISTED)  
THE CUPCAKE FACTORY INC  
JONATHAN SORRELLS  
3000 BLACKBURN STREET, SUITE 180  
DALLAS, TX 75204

BY: /S/ K. DAVID KELLY  
K. DAVID KELLY, ESQ.

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**CLERK'S DEFAULT JUDGEMENT AS AGAINST**  
**CUPCAKE FACTORY INC. AS TO PLAINTIFF IVON GARCIA**

Presently pending before the Clerk is Plaintiffs' Motion for Entry of Default by the Clerk ("Plaintiff's Motion"). The Clerk has considered the Plaintiff's Motion for Default and the summons and executed return of service for Defendant THE CUPCAKE FACTORY INC filed as DE# 5. Defendant(s) THE CUPCAKE FACTORY INC has failed to timely respond to the Complaint and therefore a Clerk's Default Judgment pursuant to Fed. R Civ. P. 55 is hereby **ENTERED** against that Defendant regarding the first named Plaintiff Ivon Garcia.

**DONE AND ENTERED** at Dallas, Texas this \_\_\_\_ day of \_\_\_\_\_ 2011.

\_\_\_\_\_  
**DEPUTY CLERK**

**CC:    Counsel of Record**  
**Defendants**